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No. 92-72

In The

Supreme Court of the United States

October Term, 1992

SABINE CONSOLIDATED, INC. and
JOSEPH TANTILLO,

Petitioners,

v.

THE STATE OF TEXAS,

Respondent.

**On Petition For A Writ Of Certiorari
To The Texas Court Of Criminal Appeals**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In light of the Occupational Safety and Health Act provision that expressly preserves state statutory rights and duties, did the court below err in enforcing Texas' criminally negligent homicide statute for crimes Petitioners committed in the workplace?

2. Is the Texas Occupational and Safety Act unconstitutionally vague?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, by and through the Travis County Attorney, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinions of the Texas Court of Criminal Appeals and the Texas Court of Appeals, Third District. Those opinions are reported at 806 S.W.2d 553 (Tex. Crim. App. 1991), and 816 S.W.2d 784 (Tex. App. – Austin 1991, pet. ref'd), respectively.

STATEMENT OF THE CASE

On September 10, 1985, a 27-foot-deep excavation trench collapsed, burying and killing two of Petitioners' employees. It is undisputed that the trench walls were composed of dirt and clay and that Petitioners failed to take adequate safety precautions to prevent the collapse of the walls. It was also established that heavy machinery was being operated in close proximity to the trench and the site of the trench wall failure.

The State of Texas charged Petitioners with criminally negligent homicide by virtue of a failure to act. TEX. PENAL CODE ANN. §19.07 (Vernon 1974). To so allege, there must be a statutory duty to act. TEX. PENAL CODE ANN. §6.01(c) (Vernon 1974). The Texas Occupational Safety Act (TOSA), which imposes on employers the general duty to provide their workers with safe workplaces, supplied that statutory duty. TEX. REV. CIV. STAT. ANN. art. 5182a §3 (Vernon 1987).

Petitioners pleaded nolo contendere to the State's allegations.

REASONS WHY THE PETITION SHOULD BE DENIED

The Texas Court of Criminal Appeals did not decide whether the OSH Act expressly preempts the Texas Occupational Safety Act (TOSA).

Petitioners' First Question asks whether the State's prosecution under a state penal statute of general applicability is preempted when that statute is "not being

utilized as a general criminal statute but as an enforcement provision for the Texas Occupational Safety Act (TOSA), which is expressly preempted by OSHA." (Petition, p. i). But the Texas court was not called upon to decide and did not decide whether TOSA is expressly preempted by OSHA. Rather, the Texas court considered "whether the Occupational Safety and Health Act of 1970 (OSHA or the Act) (29 U.S.C. §651 et seq. 1982) preempts Texas from prosecuting appellants for criminally negligent homicide." (Petition App., p. 12). Hence, the only federal question the Texas Court of Criminal Appeals' opinion presents is whether OSHA preempts a state's criminal prosecution under a penal statute of general applicability for crimes committed in the workplace.

Furthermore, the Texas criminally negligent homicide statute was not used as an enforcement provision for TOSA, as Petitioners assert. Rather, TOSA supplied merely one element of criminal conduct – the statutory duty to act – that Texas law *requires* whenever the State alleges an offense by voluntary omission. TEX. PENAL CODE ANN. §6.01(c).

Neither state nor federal decisions are in conflict on the question of whether the OSH Act preempts a state's prosecution under state statutes of general applicability for crimes committed in the workplace.

1. The Texas Court of Criminal Appeals' decision does not conflict with applicable decisions of other state courts of last resort. Every state court that has considered the specific question of OSHA's preemptive effect on state criminal laws of general applicability has given effect to the plain meaning of the OSH Act's savings clause and

concluded that OSHA does not preempt such laws. 29 U.S.C. §653(b)(4); *People v. Pymm*, 561 N.Y.S.2d 687, 563 N.E.2d 1 (N.Y. 1990), *cert. denied*, 111 S.Ct. 958 (1991) (OSHA standard does not bar state criminal prosecutions for conspiracy and assault for failure to adequately protect from dangers of mercury poisoning); *People v. Chicago Magnet Wire Corp.*, 534 N.E.2d 962 (Ill. 1989), *cert. denied sub nom. Asta v. Illinois*, 110 S.Ct. 52 (1989) [OSH Act does not preclude enforcement of state criminal law as to conduct (failure to provide safety precautions to avoid harmful exposure to toxic substances) regulated by OSHA standard]; *Michigan v. Hegedus*, 443 N.W.2d 127 (Mich. 1989) (existence of OSHA regulations governing emissions did not preempt involuntary manslaughter prosecution arising out of worker's death by carbon monoxide inhalation); *State ex rel. Cornellier v. Black*, 144 Wis.2d 745, 425 N.W.2d 21 (Wis. Ct. App. 1988) (homicide prosecution arising out of employer's failure to correct known and substantial fire and explosion hazards was not barred by OSHA standard); *P & Z Co., Inc. v. District of Columbia*, 408 A.2d 1249 (D.C. 1979) (criminal prosecution for employer's failure to report workplace injuries was not preempted by OSHA standard); *see also*, Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv.L.Rev. 535 (1987).

Petitioners seek to reinstate the result reached by the intermediate appellate court. Notably, Petitioners and the intermediate court relied on the reasoning of the intermediate Illinois court's decision in *People v. Chicago Magnet Wire*, 510 N.E.2d 1173 (Ill. App. 1987), *reversed*, 534 N.E.2d 962 (Ill. 1989), *cert. denied sub nom. Asta v. Illinois*,

110 S.Ct. 52 (1989). However, the intermediate Illinois court's decision was reversed by the Illinois Supreme Court, and this Court declined to review the Illinois Supreme Court's holding.

Petitioners cite *Thornock v. State*, 745 P.2d 324 (Mont. 1987), in support of their conflicting-state-decisions assertion. But *Thornock* is highly distinguishable from Petitioners' causes. The *Thornock* decision did not address whether a valid state criminal cause of action was preempted. Rather, it addressed whether the state was still under a common-law duty to inspect "hazardous workplaces" even though its authority to set the standards to be inspected or to impose sanctions for discrepancies had been superseded by OSHA safety standards for sawmills. The Montana Supreme Court determined that, since the power to inspect the workplace is part and parcel of the enforcement of OSHA standards, the State had no duty of inspection under Montana state common law, and therefore no state cause of action in negligence arose out of the State's failure to inspect. As the Montana court determined that there was no state law cause of action, the question of whether a valid state cause of action is preempted by OSHA never arose and was never addressed.

Furthermore, the *McElroy v. SOS Intern., Inc.* opinion does not support Petitioners' positions, as they claim. (Petition, p. 19). On the contrary, *McElroy* distinguished *Thornock* as a singular case in the body of OSHA-preemption caselaw, one involving a specific state occupational safety and health *standard* rather than preemption of state law in general. 730 F.Supp. 803, 809 n.7 (N.D. Ill. 1989). The *McElroy* opinion relied on reasoning – that of the Illinois Supreme Court in *Chicago Magnet Wire* – that

flatly is at odds with Petitioners' positions on the preemption issue.

Petitioners buttress their reliance on *Thornock* by additionally pointing out that *Thornock* was cited as authority in *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 678 (7th Cir. 1990), *aff'd sub nom. Gade v. National Solid Wastes Management Ass'n*, No. 90-1676, ___ U.S. ___ (1992). (Petition, p. 19). They fail to mention, however, that the *Sabine* opinion also was cited as authority for the very same proposition for which *Thornock* was cited: that state and federal courts are in agreement that section 18 of the OSH Act expressly prohibits states without federally approved plans from exercising jurisdiction over an occupational health and safety matter as to which OSHA has already duly promulgated a federal standard. *Id.* The *National Solid Wastes Management* case did not specifically address the issue of whether the application of a state criminal statute of general applicability is preempted by OSHA. However, in its discussion of what constitute preempted "occupational safety and health standards," this Court emphasized that section 18 does not preempt enforcement in the workplace of private rights and remedies traditionally afforded by state laws of general application. *Gade v. National Solid Wastes Management Ass'n*, No. 90-1676, ___ U.S. ___ (1992); *see also, Pedraza v. Shell Oil Co.*, 942 F.2d 48 (1st Cir. 1991).

2. Moreover, the Texas court's holding on the preemption issue does not conflict with that of any United States court of appeals. Petitioners' bare citations to the inapplicable cases of *Frohlick Crane Service, Inc. v. OSHRC*, 521 F.2d 628 (10th Cir. 1975), and *Jeter v. St. Regis Paper*

Co., 507 F.2d 973 (5th Cir. 1975), do not support their conflicting-federal-decisions assertion. In footnote 9 of its opinion, the United States Court of Appeals for the Seventh Circuit underscored this lack of conflict among state and federal courts that have considered the question of section 18's preemptive effect upon state criminal and tort rules. *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 680 n.9 (7th Cir. 1990), *aff'd sub nom. Gade v. National Solid Wastes Management Ass'n*, No. 90-1676, ___ U.S. ___ (1992).

The decision that the Texas Occupational Safety Act is not unconstitutionally vague is not in conflict with any decisions of this Court, United States circuit courts, or state courts of last resort.

Petitioners have failed to allege a conflict in this Question and merely attempt to distinguish two Supreme Court cases that do not support their legal positions. The court of appeals correctly examined Petitioners' vagueness challenge in light of the facts and the context of this particular case, that is, on an as-applied basis. *United States v. Powell*, 423 U.S. 87 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963). Petitioners do not argue that TOSA was unfairly applied to them. And they could not actually have doubted that their failure to slope and shore a twenty-seven-foot deep trench deprived the deceased employees of a "reasonably safe and healthful" place of employment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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